

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRIAN P. KEMP, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

SEPTEMBER 1, 2017

3:03 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

<i>OFFICIAL COURT REPORTER:</i>	<i>SHANNON R. WELCH, RMR, CRR</i>
	<i>2394 UNITED STATES COURTHOUSE</i>
	<i>75 TED TURNER DRIVE, SOUTHWEST</i>
	<i>ATLANTA, GEORGIA 30303</i>
	<i>(404) 215-1383</i>

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

FOR THE PLAINTIFFS:

BRYAN MYERSON WARD
HOLCOMB & WARD, LLP

EDWARD BRUCE SCHWARTZ
JOE ROBERT CALDWELL, JR.
MOLLY POAG
STEPTOE & JOHNSON, LLP

FOR THE STATE OF GEORGIA DEFENDANTS:

CRISTINA CORREIA
ELIZABETH AHERN MONYAK
ATTORNEY GENERAL'S OFFICE - ATLANTA

FOR THE FULTON COUNTY DEFENDANTS:

KAYE WOODARD BURWELL
DAVID R. LOWMAN

FOR THE DEKALB COUNTY DEFENDANTS:

BENNETT DAVIS BRYAN
DEKALB COUNTY DEPARTMENT OF LAW

FOR THE COBB COUNTY DEFENDANTS:

DANIEL WALTER WHITE
HAYNIE LITCHFIELD CRANE & WHITE

FOR REPRESENTATIVE KAREN HANDEL:

ANNE WARE LEWIS
STRICKLAND BROCKINGTON LEWIS LLP

P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; September 1, 2017.)

COURTROOM DEPUTY CLERK: Good afternoon, Counsel. This is Amy McConochie, Judge Totenberg's courtroom deputy clerk. The Court is joining the conference call in Civil Action 17-CV-2989. That is the case of *Curling, et al. vs. Kemp, et al.*

Everyone, I'm going to remind you that we have a large number of people on the line. So you need to announce your name before you start speaking so that both Judge Totenberg and the court reporter, Ms. Welch, know who is speaking at any given time.

Ms. Burwell, I'm going to remind you in particular. We have a hard time hearing you sometimes. So if you can please speak up or if you are using a speakerphone maybe not use a speakerphone, that will help us. We had a little difficulty hearing you the last couple of phone conferences.

Now I'm going to ask everyone to please introduce themselves starting with counsel for the plaintiff, and then we will get the conference call started and you'll be on the line with Judge Totenberg. Thank you.

MR. WARD: This is Bryan Ward of Holcomb & Ward for the plaintiffs. And I believe Steptoe counsel is also on the line as well.

MR. CALDWELL: Yes. This is Joe Caldwell for the

1 plaintiffs. And also Ed Schwartz and Molly Poag are also here.

2 MS. CORREIA: This is Cris Correia and Elizabeth
3 Monyak on the behalf of the State defendants.

4 MR. BRYAN: Bennett Bryan on behalf of the Dekalb
5 defendants.

6 MR. WHITE: Daniel White on behalf of the Cobb County
7 defendants.

8 MS. BURWELL: Kaye Burwell and David Lowman on behalf
9 of Fulton County.

10 MS. LEWIS: And this is Anne Lewis on behalf of the
11 candidate Karen Handel.

12 THE COURT: All right. This is Judge Totenberg.
13 First of all, I hope y'all have a good weekend and that it is
14 going to be better than it was going to be in light of the
15 plaintiffs' decision so that people aren't running around in
16 10,000 directions this weekend.

17 I'm expecting counsel from Steptoe to resolve their
18 status here in the next two weeks. And you are allowed to
19 continue to participate in phone conferences pending that.

20 Ms. Lewis, as a courtesy to you, I have said you can
21 participate. But I don't believe that is appropriate ad
22 infinitum unless you do something that would provide me a basis
23 for authorizing that. Whether that is --

24 MS. LEWIS: Yes, Judge Totenberg. I appreciate that.
25 Representative Handel was served with a copy of the complaint

1 today.

2 THE COURT: All right. Very good.

3 MS. LEWIS: I will enter an appearance, and I
4 appreciate you letting me participate before that.

5 THE COURT: That is no problem.

6 Well, I have scanned briefly the defendants' motion
7 to stay related -- discovery-related activities that arrived
8 essentially 20 minutes ago. Though I didn't see it 20 minutes
9 ago. I have looked, of course, at the letter that was sent by
10 Mr. Ward on behalf of plaintiffs and their proposed scheduling
11 order.

12 I wanted to chat at this point about the way I
13 perceived the schedule here, and that impacts both the
14 discovery issues and the schedule as a whole. Some of our
15 scheduling issues even for the future are a function of
16 plaintiffs' position, and some of them are actually also a
17 function of the defendants having removed this to -- this case
18 to this court, which, of course, meant we lost time that way.
19 And if the defendants insist on invoking their rights to
20 basically stay discovery while I look at the motions to
21 dismiss -- you have a right to do that, but I will say also
22 then you're pressing up against your own deadlines and time
23 frame in the end. And I take note of that because it is not
24 simply the plaintiffs' fault under these circumstances.

25 I think that in light of the defendants' position, we

1 ought to try to get the plaintiffs to get an amended complaint
2 and a motion for preliminary injunction still in here as
3 quickly as possible. I don't perceive our being able to
4 necessarily resolve the motion to dismiss until the beginning
5 of October. And so the sooner that the plaintiffs have an
6 amended complaint, the sooner we can -- it is probably likely
7 to be very much the same motion to dismiss. Although it might
8 be somewhat different and more streamlined also because
9 plaintiffs have said they will file a streamlined complaint.

10 So I think that I want to ask plaintiffs' counsel:
11 When is the soonest you think you could actually file an
12 amended complaint?

13 MR. CALDWELL: Your Honor, this is Joe Caldwell.
14 Again, thank you for permitting us to address you in these
15 proceedings.

16 You referenced the proposed scheduling order. And I
17 just want to amend that in one respect by saying that we are
18 not proposing to the Court that it adopt the scheduling order.

19 THE COURT: I know. I understand that.

20 MR. CALDWELL: Okay.

21 THE COURT: It was simply a proposed schedule sort of
22 trying to show that you're trying to move this and what type of
23 schedule would work in your judgment.

24 MR. CALDWELL: Exactly. And so we do plan to confer
25 with opposing counsel about this. But on the schedule that we

1 proposed, we suggested that the plaintiffs file the amended
2 complaint on September 22nd. And that by filing on
3 September 22nd, then defendants could file their -- their
4 answer or their motion to dismiss by October 10.

5 THE COURT: I see that. I see that. But I'm asking
6 you can you -- basically I'm suggesting given what I see as
7 some issues on the schedule, can you move faster than
8 September 22nd so that I can get to the defendants' motion
9 sooner?

10 MR. CALDWELL: Well, Your Honor, we will do our best
11 to see if we can pick a date sooner than that.

12 THE COURT: All right. I mean, here is the general
13 point. You're still going to have to hustle. Everyone is
14 going to have to hustle in order to have a potential trial on
15 this matter that would be a timely trial or a preliminary
16 injunction hearing.

17 What plaintiffs have suggested here is March 13. I
18 think it is probably also a little bit late given the fact that
19 as far as I know approximately early voting begins April 30th.
20 And then you again -- once again are looking at preparations
21 for early voting taking two, three weeks. And if there were to
22 be a remedy that would actually require ballots -- paper
23 ballots as you have suggested, maybe four weeks. So I think
24 March 13 is late. So I think you need to think about this
25 schedule.

1 I'll now direct that to the plaintiffs' as well as to
2 defendants' counsel. You need to think about it as moving at a
3 time that will allow the trial ideally no later than the second
4 or third week in February.

5 MR. CALDWELL: This is Joe Caldwell for the
6 plaintiffs. We could be prepared to do that, Your Honor. We
7 had picked a date that we thought since it is two and a half
8 months before the date of the election going by what defendants
9 had said to this point about how much time that they would
10 need, which seemed to be somewhere around four to six weeks,
11 that March 13 might be adequate. We can accelerate that time
12 and be prepared to go even sooner.

13 THE COURT: The point on all of this is I'm not fast.
14 I have many other cases I have to handle at the same time. So
15 this is the issue. And when we're talking also about
16 potentially more voters, it also is more -- might take more
17 time.

18 So if I were you, I would be really looking at the
19 middle of February if you want this possibly to preserve the
20 option of a sensible briefing schedule post hearing as well as
21 sensible time frame in the event that you actually prove your
22 entitlement to relief and the same sorts of issues obviously
23 from the defendants' perspective.

24 So when I look at the schedule as a whole, the place
25 that you probably need to push it most is right upfront here.

1 The sooner you get an amended complaint, the sooner we'll get a
2 properly amended motion.

3 I'm going to just right now -- because I know how
4 long the complaint was -- amended complaint, if you're
5 promising that it is going to be amended so as to streamline it
6 but to add your privacy claim, I'm right now just in the
7 interest of judicial efficiency going to authorize you to file
8 the -- an amended complaint so that I don't go through that
9 process of having to determine whether to do it.

10 So because the defendants have briefed the issue of
11 their defenses many times over, I don't see any reason why you
12 need any more time than you already normally would have to file
13 a response. And, in fact, I think you need less time because
14 of that. I don't really think the privacy claim changes the
15 complexion of your defenses.

16 MS. CORREIA: Your Honor, this is Cris Correia for
17 the State defendants. I have no idea what they are going to
18 file, Your Honor. I don't know if that is just one new claim,
19 multiple claims, state and federal claims. We don't know.
20 They did not file the supplemental complaint today with their
21 one additional claim.

22 I don't know what facts they are going to allege, if
23 they are the same ones or not. I certainly don't expect that
24 we would take any more time than the Federal Rules allow. But
25 I would at least like to see the complaint and see how long it

1 is before, you know, the Court cuts our time from what the
2 Federal Rules allow.

3 MR. CALDWELL: Your Honor, again for the plaintiffs,
4 this is Joe Caldwell. We had initially said September 22nd for
5 us to file the amended complaint. We'll move that up a week to
6 September 15 so that all of those dates then presumably --
7 well, a week for consideration.

8 THE COURT: All right.

9 MS. CORREIA: Your Honor, this is Cris Correia with
10 the State defendants again. I just have one question. I
11 understand that the plaintiffs want to enjoin future use of the
12 DRE system. But if we are intending on having motions to
13 dismiss resolved and then with whatever claims survive going
14 forward with discovery to a trial, is there a need to also
15 separately brief a preliminary injunction issue?

16 I mean, if we are not trying to enjoin anything until
17 2018, what is the purpose of having a second round of briefing
18 on essentially the same substantive issues in filing a
19 preliminary injunction motion? I'm just not quite sure I
20 understand the point of that.

21 MR. SCHWARTZ: This is Ed Schwartz for the
22 plaintiffs, Your Honor. If I could address that. The concept
23 is that we would be seeking to enjoin the use of the electronic
24 voting equipment in the May election. And, you know,
25 whether -- and, you know, whether you view the process for

1 seeking the equitable -- that particular equitable relief as
2 preliminary or final, I don't know that it is of any moment to
3 the Court or to the parties.

4 But the reality -- and we could call it a motion for
5 an injunction or a motion for preliminary injunction. We'll be
6 seeking the exact same relief. And I think the question is
7 really about the schedule as opposed to what we call the
8 motion.

9 And, if anything, I would think that the defendants
10 would be looking to brief that issue sooner rather than later.
11 But, of course, this is something that we're happy to discuss
12 with the defendants and ultimately will be up to the Court.

13 THE COURT: Well, I think Ms. Correia's question
14 really is if some of the -- at least some of the claims are
15 going to be disposed of why are we conducting discovery on
16 them. I mean obviously she hopes that all of the claims are
17 dismissed.

18 But if some of the claims or some of the defendants
19 are dismissed, what is the point of going full blast on
20 briefing the injunction motion is her question.

21 MR. CALDWELL: Your Honor, this is Joe Caldwell.
22 Again, the schedule that we were anticipating doesn't really
23 talk about discovery commencing until November 8 even under
24 this schedule. We had --

25 THE COURT: Go ahead.

1 MR. CALDWELL: We had put a provision in here for
2 initial disclosures. They don't have to be initial disclosures
3 on October 30. But there would be no discovery prior to
4 November 8.

5 THE COURT: All right. I think then the question is:
6 Is there any value in your filing a motion for an injunction
7 that will require -- trigger the requirement for the response
8 at that time? Why not have it later?

9 You will have already placed a -- made a request for
10 injunctive relief, I assume, in your amended complaint. And,
11 of course, you can then -- you'll have to no matter what at
12 some juncture file it. But she's just simply, I think, asking
13 what is the point before I dispose of the issues by their
14 motion -- by their motion to dismiss.

15 MR. SCHWARTZ: Your Honor, this is Ed Schwartz. I
16 think it is a fair question. And, you know, I think our view
17 on the schedule, as Joe mentioned, is that it is a proposal.
18 And we look forward to discussing it with the defendants and
19 hopefully coming up with a schedule that makes sense that we
20 can jointly propose to Your Honor.

21 I think for us, you know, the timing of the motion
22 may not be nearly as important as ensuring that we are able to
23 get the discovery that we're going to need to properly litigate
24 the claims in a timely way. And that, of course, implicates
25 the motion that the plaintiff -- that the defendants have just

1 filed.

2 And we're also happy to confer with them on what that
3 discovery would look like and when we -- and to try and work
4 out a schedule for it. But that discovery certainly is going
5 to include at a minimum discovery that we saw -- that the
6 plaintiffs sought in their motion for expedited discovery. And
7 that includes the appropriate forensic discovery of the
8 electronic voting equipment that they used in June and that
9 they plan on using in the November election.

10 THE COURT: Well, I'm just looking at the calendar.
11 And -- well, the 14th day is September 29 anyway. So you can
12 have your full 14 days, Ms. Correia, to respond. But don't
13 expect -- but I won't give any extensions on it.

14 MS. CORREIA: Understood.

15 THE COURT: And the plaintiffs, of course, are
16 welcome to file their reply. But, again, don't expect any
17 extension. And the sooner you do one, the sooner the whole
18 thing is going to be reviewed. That is -- so -- just one
19 second.

20 **(There was a brief pause in the proceedings.)**

21 THE COURT: So if you end up taking the full 14 days,
22 you're really throwing us into the middle of October. So I
23 highly -- I think that you probably really need to get it -- I
24 know that they are likely to write a lot, but you can already
25 see a preview of all that is to be written in what has already

1 been filed. So I don't think it is worth a lot to -- relative
2 to the whole situation for you to go on too long. So my
3 suggestion to you is that you really try to get your response
4 in by ten days.

5 I'm not going -- I will say you can have 14 days, but
6 you're cutting in your own time. Because if you want me to
7 basically rule, you have to think it is going to take us
8 potentially about three weeks to get to this. The sooner it
9 gets to us, the better.

10 So if you're wanting to begin discovery in November
11 and you're thinking -- and you just have to work back on this.
12 The sooner you get it to us, again, the better. And I think
13 that is in all of the planning for scheduling. Everyone has to
14 think about that. It is not like this is my only case, even if
15 it is a significant case.

16 And the other issue, of course, is that the holidays
17 consume a lot of this time. So -- but, again, I do need to say
18 to the defendants I think that some of these claims may survive
19 because I have read -- I think there's a whole portion of your
20 motion to dismiss that is based on well settled law that much
21 -- obviously, the sovereign immunity is going to be a fortress
22 for you. But that doesn't mean that, for instance, a mandamus
23 claim wouldn't potentially proceed.

24 So I just urge you to get real about that in terms of
25 thinking about not standing on your right to say I'm not going

1 to discuss anything about discovery or about a schedule with
2 counsel. Because it is really not a productive position to be
3 in. Though you have a right to do that.

4 MS. CORREIA: Yes, Your Honor.

5 THE COURT: Okay. All right. So I think it might
6 make more sense for plaintiffs to file a motion for preliminary
7 injunction, frankly, after I've disposed of the motion to
8 dismiss and whatever happens. But, again, you're welcome to
9 file it knowing what your workload is as soon as you want to.

10 And that way if any of the claims survive, the
11 defendants are then basically in a position they have got to
12 respond basically right away. So you can be the judge of that.
13 Either way it is fine. But I would urge you -- I know that
14 Steptoe counsel are new to the case and may not be completely
15 familiar with all the doctrines that are being asserted as
16 defenses here. But there is plenty of good grounds asserted by
17 the State also.

18 So you might as well begin working on that right away
19 in knowing what the future holds for you in terms of shaping
20 what you want to focus on if you're going to file a preliminary
21 injunction and get it moving.

22 What I certainly don't want to have is a motion for
23 preliminary injunction one month before what we thought was
24 going to be potentially a trial. That is not going to work.
25 So it obviously all -- something has got to be filed by

1 November.

2 But I do trust that you all are going to be able to
3 talk about this more. And if the State and the other
4 defendants choose not to because of their ability to resist
5 discovery and forestall litigation, that is -- I just -- you
6 have every right to do that, again. But I'm going to be a lot
7 less sympathetic when everyone is crying about the equities of
8 why are we moving forward so quickly if we have to later on in
9 the litigation. So that is where we're at.

10 As soon as we get the State's motion to dismiss and
11 the plaintiffs' response, we're going to be beginning work on
12 this. And while there may never be a trial in this matter, we
13 will try to pin down a date for one just simply so everyone has
14 it on their schedule.

15 I have no idea how long such a thing would take. I
16 don't know what the scope of it would be, and I don't know that
17 we'll get to that point either. But I think it is important to
18 get a date. And so I'll just ask Ms. McConochie to save a week
19 for a trial.

20 Is there anything else we should address at this
21 time?

22 MR. CALDWELL: Yes, Your Honor. Joe Caldwell. I
23 think that there is one outstanding order of record now. And
24 that is that Tuesday -- this coming Tuesday is the deadline for
25 plaintiffs to respond to defendants' motion to dismiss. And it

1 seems like the discussion today and the proposed scheduling
2 order would obviate the need to do that.

3 THE COURT: All right. Any response from defendants'
4 counsel to that?

5 MS. CORREIA: No, Your Honor. If they are going to
6 file an amended complaint that they already have leave for, I
7 don't see any reason to file two briefs.

8 THE COURT: All right. So -- well, I will -- based
9 on the conversation that we've had here, I'm going to find that
10 the motions to dismiss are deemed moot. And in the event that
11 the plaintiffs don't file an amended complaint as represented,
12 the defendants will have leave to basically reassert their
13 same -- the prior motions to dismiss that are right now pending
14 in front of me.

15 Does that make sense?

16 MS. CORREIA: Yes, Your Honor.

17 MS. BURWELL: Yes, Your Honor.

18 THE COURT: So we're going to see an amended
19 complaint from the plaintiffs on September 15 and the -- a
20 response from the defendants on the 29th. And no extensions
21 will be granted. Same thing as to any reply. And, again,
22 we're looking for a reply as soon as possible from plaintiffs'
23 counsel. And we'll go from there. All right.

24 MS. BURWELL: Your Honor, this is --

25 THE COURT: Yes?

1 MS. BURWELL: Your Honor, this is Kaye Burwell. We
2 had one other issue. The issue of the litigation hold is still
3 pending. We had provided the plaintiffs with the information
4 it requested last week. We're still waiting to hear from them
5 in terms of what they would like to do with that information.

6 But whatever it is, we would like for that to be
7 completed within the next two weeks since we have got to use
8 those machines.

9 MR. CALDWELL: Your Honor, Joe Caldwell again. That
10 is one of the reasons why we thought we would have our
11 meet-and-confer with opposing counsel on September 8 so that we
12 can address those issues.

13 THE COURT: Well, that makes sense to us. Is that
14 feasible for defense counsel? Are you willing to do that?

15 MS. BURWELL: Kaye Burwell again, Your Honor. We
16 would be happy to meet and confer. The only concern we have is
17 that the more time that passes, if they expect to use or sample
18 more than a few of the machines, we're running up against
19 deadlines.

20 THE COURT: Okay.

21 MR. CALDWELL: Your Honor, I don't think that a
22 one-week time frame would unduly delay their efforts going
23 forward. Our understanding is that there are many more
24 machines that would be available for use, and we don't expect a
25 large sampling that would undermine that. So September 8

1 should be a sufficient time for us to do that.

2 MR. SCHWARTZ: Your Honor, this is Ed Schwartz. If I
3 could address one more point on that. I'm confident the
4 defendants are aware of this. But the litigation hold affects
5 also the servers at CES as to which plaintiffs have sought
6 discovery and will seek discovery going forward, and we're
7 happy to discuss with the defendants that issue as well on
8 September 8.

9 THE COURT: So let me ask you, Mr. Schwartz and
10 Mr. Caldwell. You don't think you can be available a little
11 bit earlier in the week simply so that we haven't lost
12 basically all of that next week to follow up on things?

13 MR. CALDWELL: Yes, Your Honor, we could.

14 THE COURT: Can everyone get together on the 6th,
15 which it seems to be any day is useful?

16 MS. BURWELL: Fulton County is available, Your Honor.

17 THE COURT: All right.

18 MS. CORREIA: Your Honor, this is Cris Correia with
19 the State. I am available to discuss the litigation hold with
20 plaintiffs' counsel. I'm assuming that is the meet -- what we
21 are meeting and conferring about is limited to the litigation
22 hold at this point.

23 MR. CALDWELL: Joe Caldwell, again. And also the
24 schedule.

25 MS. CORREIA: Cris Correia, again. Your Honor, there

1 is not even a pending complaint. And we intend to reassert our
2 immunities. I'm sorry. I do intend to assert our right not to
3 have to subject ourselves to discovery until the immunity
4 issues are dealt with. And maybe they will not arise if the
5 plaintiffs' second amended complaint does not bring forth
6 claims that we believe are barred by either Eleventh Amendment
7 or sovereign immunity or qualified immunity.

8 But until we can see that, we do intend to assert our
9 right not to participate in discovery.

10 MR. CALDWELL: I think all we're talking about is
11 defendants' willingness to sit down and discuss the schedule at
12 the September 5 meet-and-confer.

13 MS. CORREIA: My concern is there is no schedule
14 until after -- I mean, I'm certainly willing to discuss the
15 litigation hold and the overall schedule generally. But I
16 can't commit to a schedule until I know what we are going
17 forward on.

18 At this point there is not even a complaint I can
19 look at. It is difficult to -- you want me to confer about a
20 schedule before there is any claims against my clients in front
21 of me. I don't know which of my clients you are going to sue.
22 I don't know what capacity you're going to sue them. I don't
23 know if it is federal claims or state claims. I mean --

24 THE COURT: All right.

25 MR. CALDWELL: That's fine. We'll do our best to

1 work this out with defendants on September 5. And if we're
2 unable to, then I'm sure we'll both -- we'll certainly be
3 prepared to make a unilateral proposal to the Court.

4 THE COURT: All right. Recognize that the case from
5 the Eleventh Circuit that the State has cited is still
6 controlling on me from the Eleventh Circuit about the -- their
7 right to stand on their haunches about this.

8 But, anyway, you all try -- I would suggest that you
9 try to figure out a time either the 5th or the 6th. The 6th
10 might be better only so that everyone gets back from Labor Day
11 weekend and gets themselves together. But I think you should
12 try to do this -- resolve this as quickly as possible about the
13 litigation hold so that we don't run afoul of any problems
14 either from the plaintiffs' perspective about getting things
15 preserved that you need to be preserved and from the
16 defendants' perspective of having what machinery you really
17 need.

18 All right. Well, it seems like we have gone as far
19 as we can go. I think there is a song that is like that or
20 something like that. Have a very good weekend.

21 I'm glad that the plaintiffs decided to take the
22 Court's advice about moving on so that we can deal with a still
23 expedited time schedule but something that will allow us to
24 function a little more reasonably in addressing serious issues
25 and serious defenses.

1 Have a very good weekend. Unless -- does anyone else
2 have anything else they want to raise before we close?

3 All right. Hearing nothing, have a good weekend.
4 We're adjourned.

5 MR. SCHWARTZ: Thank you, Your Honor.

6 MR. CALDWELL: Thank you, Your Honor.

7 **(The proceedings were thereby concluded at 3:39**
8 **P.M.)**

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 22 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 8th day of September, 2017.



SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
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